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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5192 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SATHALIYA KANJIBHAI RAJABHAI

Versus

DISTRICT EDUCATION OFFICER

Appearance:

MR BR PARIKH for the Petitioners.

Mr. Ketan M. Parikh, ASSTT. GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 06/08/2001

ORAL JUDGEMENT

This petition has been filed for a direction and declaration that the cut off date of 1.7.90 prescribed in para-6 of the resolution no. LVE-1090(D-30)-5 dated 26.3.1991 is illegal, void,

unconstitutional and violative of Article 14 of the Constitution of India.

2. The petitioner was appointed as Laboratory Assistant in the school managed by the respondents vide order dated 21st June, 1952 passed by the Deputy Education Inspecctor. The petitioner was posted as Principal Class III from 1st February, 1985 at the Kamalshi Highschool, Babra, Dist: Amreli. The petitioner was promoted from 18th November, 1986 as Deputy District Primary Education Officer class III (Mid-day Meal scheme) and posted at Amreli. Thereafter, the petitioner was transferred as Principal class-II at Government D.V.S.K. High school, Jasdan, Dist: Rajkot which was being managed by the State Government and the petitioner retired on 31st March, 1990. As such, the petitioner served the State of Gujarat for about 38 years. It is stated that he had at his credit balance of ununtilised half pay leave of 303 days. The petitioner made several representations to the authorities concerned for encashment of the untilised half pay leave and he sent a legal notice dated 4.9.92 to the respondent. The respondent no.1 informed by his letter dated 24th September, 1992 that he cannot be given the aforesaid benefit to encash his above untilised half pay leave as benefit of the Resolutions dated 4.8.90 and 4.9.90 issued by the Education Department of the State of Gujarat are to be given effect from 1.7.90. Therefore, the petitioner has filed the present petition.

3. I have heard the learned advocates for the parties and perused the relevant papers on record. The contention of the learned counsel for the petitioner is that the resolution dated 26th March, 1991 by which this benefit has been extended has been given effect from 1st July, 1990 while the petitioner retired on 31st March, 1990. Therefore, the petitioner has been denied thebenefit on the basis of the cut off date mentioned in para-6 of the Government resolution dated 26th March, 1991 and this cut off date is illegal, null and void and in violation of Article 14 of the Constitution of India. Hence, he has prayed that the cut off date mentioned in the above Government resolution be struck down. In this regard, he also relied on the decision of this Court in the case of Kamlaben widow of Govindlal Harilal Sheth vs. State of Gujarat and another reported in 1989(2) GLR, 1068 wherein it has been considered that the new Scheme of Family Pension came into force with effect from June 1, 1971 and was made applicable to all regular employees on pensionable establishment-temporary or permanent who were in service on June 1, 1971 or were recruited

thereafter. Under para-5 of the Resolution every Government servant eligible to the benefit of the above scheme was required to surrender a portion of gratuity where admissible, equal to his two months' pay subject to the maximu of Rs.3600/- (revised to Rs.5000/-). Government of Gujarat in Finance Department by Resolution no. FPS-1077-2485-P dated October 17,1977 decided to do away with the provisions of recovery of two months' pay from the amount of gratuity for the eligibility of the benefit of the New Family Pension Scheme, 1972. Accordingly, it directed that no deduction should be made from the amount of death-cum-retirement gratuity as a contribution towards Family Pension Scheme under the New Family Scheme, 1972. The Resolution stated that the above order would take effect from October 1, 1977. It was made clear that the order would be applicable to those who retired on October 1, 1987 and thereafter. The respondent Government was directed to compute the amount of pension and arrears of pension payable to the petitioners and such widows and dependents on the above basis and make the payment of arrears of pension on or before May 31, 1989. The State Government was further directed to pay to each of the petitioners and such widows and dependants of the retired Government servants and other persons referred to who are similarly situated, family pension from month to month regularly or or before 10th of every month with effect from April 1, 1989.

4. The learned advocate for the petitioner also relied on the decision of this Court in the case of Indumati A.Patel vs. State of Gujarat reported in 1987(1) GLR, 389 wherein the cut off date, namely June 1, 1971 prescribed in the Government Resolution dated January 1, 1972 prescribed in the Government Resolution dated January 1, 1972 was declared as illegal and void as the same was violative of the provisions of Article 14 of the Constitution of India and it was further directed that the petitioner shall be entitled to claim thebenefits flowing from the resolution as if the words "who were in service on or after 1st June, 1971" were never there in the resolution. The respondents were directed to compute the amount of pension payable to the petitioner in light of the principles laid down in the judgment latest before 31st December 1986.

5. I have carefully considered the contentions of the learned counsel for the petitioner and have gone through the authorities cited by him in support of his case. The Supreme in the case of Smt. Poonamal and others vs. Union of India and others reported in 1985(3) SCC, 345 has observed as under:

"3. Family pension came to be conceptualised in the year 1950. When a Government servant dies in harness or soon after retirement, in the traditional Indian family on the death of the only earning member, the widow or the minor children were not only rendered orphans but faced more often destitution and starvation. Traditionally speaking the widow was hardly in a position to obtain gainful employment. She suffered the most inasmuch as she wass deprived of the companionship of the husband and also became economically orphaned. As a measure of socio-economic justice family pension scheme was devised to help the widows tide over the crisis and till the minor children attain majority to extend them some succour. This appeared to be the underlying motivation in devising the family pension scheme. It was liberalised from time to time. The liberalisation was however subject to the condition that the Government servant had in his lifetime agreed that he shall make a contribution of an amount equal to two months' emoluments of Rs.5000 whichever is less, out of the death-cum-retirement gratuity. Those Government servants who did not accept this condition were denied the benefit of family pension scheme."

"5. The Union of India in its onward march for ushering in socio-economic justice in the form of social security further took a bold and imaginative step on September 22, 1977 by which the pre-condition of contribution of two months' emoluments out of death-cum-retirement gratuity was done away with."

6. In the case of Union of India vs. Bidhubhushan Malik and others reported in AIR 1984, SC, 1177, the Supreme Court has stated regarding conditions of High Court Judges. Para 10 of the 1st Schedule the words "and who has retired on or after 1st day of October 1974" were declared unconstitutional and were struck down. In the case of D.K.Nakara and others vs. Union of India reported in AIR 1983, SC, 130, the Supreme Court has observed as under:

"But we make it abundantly clear that arrears are not required to be made because to that extent the scheme is prospective. All pensioners whenever they retired would be covered by the liberalised pension scheme, because the scheme is a scheme for payment of pension to a pensioner

> governed by 1972 Rules. The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensioners and those who retired subsequent to that date. In case of pensioners who retired prior to the specified date, their pension would be computed afresh and would be payable in future commencing from the specified date. No arrears would be payable. And that would take care of the grievance of retrospectivity. In our opinion, it would make a marginal difference in the case of past pensioners because the emoluments are not revised. The last revision of emoluments was as per the recommendation of the Third Pay Commission (Raghubar Dayal Commission). If the emoluments remain the same, the computation of average emoluments under amended Rule 34 may raise the average emoluments, the period for averaging being reduced from last 356 months to last 10 months. The slab will provide slightly higher pension and if someone reaches the maximum the old lower ceiling will not deny him what is otherwise justly due on computation. The words "who were in service on 31st March, 1979 and retiring from service on or after that date" excluding the date for commencement of revision are words of limitation introducing the mischief and are vulnerable as denying equality and introducing an arbitrary fortuitous circumstance can be served without impairing the formula. Therefore, there is absolutely no dificulty in removing the arbitrary and discriminatory portion of the scheme and it can be easily severed."

7. On the basis of the above propositions of law laid down by the Supreme Court, the Supreme Court has considered the benefit of pension and family pension when a Government servant dies in harness or soon after retirement in traditional Indian family on death of the only earning member, widow and/or minor children were not only rendered orphans, but faced destitution and starvation. In regard to the family pension, The Supreme Court has considered the relevance of the family pension to the widow and minor children of the deceased. Hence, if any cut off date has been fixed in that regard, after implementation of the family pension, the cut off date has been struck down though in the case of Poonamal vs. Union of India (Supra), the cut off date has also been

removed by the Government itself and the Government of India submitted its clarification on the aforesaid three points which read as under:

(i) Government are prepared to grant to the dependents i.e. minor sons, etc. of the pensioners governed under pre-1964 scheme the same pensionary benefits as are admissible to the dependents under the current pension rules.

(ii) It is clarified that Government are agreeable to apply the increased pension rates introduced from January 1, 1973 to all the eligible persons, including dependents. This will, however, be subject to the condition that the total amount admissible (excluding dearness relief) under the liberalised provision now being agreed to, will not be more than what is admissible to a person covered under the current rules.

(iii) Governmetn have already agreed to the grant of arrears of family pension with effect from September 22, 1977-the date on which contribution of two months' emoluments by pensioners was dispensed with. Persons who are now to be granted the benefit of family pension will not be required to contribute two months' emoluments. Similarly, no demand for refund of contribution already made by pensioners will be entertained."

The learned counsel appearing for the petitioner stated before the Apex court that nothing more was required to be done in view of the clarification made by the Government itself. In the present case, the petitioner is claiming encashment of unutilised half pay leave which is available with effect from 1st July, 1990 though the petitioner retired on 31st March, 1990. The submission of the learned counsel for the declaration that the cut off date mentioned as 1.7.90 as illegal and arbitrary and in violation of Article 14 of the Constitution of India is not sustainable in the eye of law in view of the fact that the Supreme Court has taken into account the cut off date as violative in a particular set of facts regarding family pension and the present case is not a case of family pension. Secondly, whenever any Act is enacted, Rules are framed or when any Government Resolution is passed providing certain benefits to its employees or ex-employees, any date has to be mentioned for implementation of that policy under the Act or Rules or Government Resolution. If such date

as mentioned in the Act or Rules or Government Resolution is declared as illegal and in violation of constitutional provisions, then such benefits should also be allowed when the Act, Rules or Government Resolution was not in existence at all which is not permissible in law. Therefore, the date of implementation is required to be mentioned in the Government resolution, Act or Rules. In each and every case, such date cannot be declared as illegal and ultra vires and such cut off date cannot be treated as illegal, null and void and in contravention of the provisions of Article 14 of the Constitution of India.

8. In view of the above discussion, I do not find any merit in this petition. Accordingly, this petition is dismissed. Rule is discharge with no order as to costs.

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